

# Graham & James LLP



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July 15, 1996

## VIA HAND DELIVERY

Office of the Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

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JUL 15 1996

Federal Communications Commission  
Office of Secretary

**Re: Reply Comments of California Payphone Association  
in CC Docket 96-128**


Dear Sir or Madam:

In accordance with the Commission's Rules of Practice and Procedure (47 CFR Part 1, Subpart A) and the procedures specified in the Notice of Proposed Rulemaking issued June 4, 1996, and the Order released June 20, 1996, in the above docket, enclosed please find an original and 14 copies of the Reply Comments of California Payphone Association, submitted this day for filing with the Commission.

Two copies of the reply comments and an electronic version on disk are being provided the Common Carrier Bureau, Enforcement Division, this date.

Also, an extra copy of the reply comments is enclosed for returning a file-stamped copy to our office in the envelope provided.

Very truly yours,

  
Martin A. Mattes  
of  
GRAHAM & JAMES LLP

MAM:jw

Enclosures

cc w/ enc: Common Carrier Bureau (2 copies and disk)  
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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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JUL 15 1996

Federal Communications Commission  
Office of Secretary

In the Matter of )

Implementation of the )  
Pay Telephone Reclassification )  
and Compensation Provisions of the )  
Telecommunications Act of 1996 )  
\_\_\_\_\_ )

CC Docket No. 96-128

**REPLY COMMENTS OF CALIFORNIA PAYPHONE ASSOCIATION  
ON NOTICE OF PROPOSED RULEMAKING**

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July 15, 1996

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CC Docket No. 96-128

**REPLY COMMENTS OF CALIFORNIA PAYPHONE ASSOCIATION  
ON NOTICE OF PROPOSED RULEMAKING**

In accordance with the Commission's General Rules of Practice and Procedure, 47 CFR Section 1.1 et seq. and the specific procedures set forth in the Commission's Notice of Proposed Rulemaking ("NPRM") released June 6, 1996, in the above-captioned proceeding, California Payphone Association ("CPA") respectfully submits its reply comments in response to the opening comments of various parties.

**I.**

**SUMMARY OF REPLY COMMENTS**

CPA's reply comments are directed to the mechanics, level and timing of compensation payable to payphone providers and to certain rules necessary to achieve fair competition between incumbent local exchange carriers ("LECs") and independent payphone providers ("IPPs") in the provision of payphone services. As in the case of its opening comments, CPA does not try to respond to all issues of concern to its members, but rather relies on and endorses the views expressed in the

reply comments of the American Public Communications Council ("APCC") on issues not expressly addressed below.

As to the setting of fair compensation for calls completed by use of payphones, CPA offers the following views:

- ◆ The Commission should adopt the proposal of the Florida Public Service Commission and the Florida Public Telecommunications Association to set a uniform rate for local coin calls, while providing state regulatory agencies the opportunity to petition for variances from the nationwide rate.
- ◆ In considering proposals to base compensation for non-coin calls on incremental or marginal costs, the Commission should recall that the need for it to set compensation levels at all results from the mandate that payphone providers allow access for non-coin calling; thus, it is the Commission's role to establish a surrogate for the price a competitive market would set for delivery of such calls if payphone providers were free to choose whether to deliver them or not.
- ◆ As several parties have suggested, the incumbent LECs' demonstrated experience in billing carrier access calls justifies making them responsible for managing the tracking, billing, and collection of compensation for non-coin calls placed from their payphones and for unbundling such functions for the use of IPPs and their billing agents as well.
- ◆ Concern expressed by various parties about the potential for fraud should not dissuade the Commission from ordering per-call compensation for subscriber 800 calls and certainly does not support an arbitrary definition of a "completed call" that excludes calls of short duration; rather, the appropriate protection against fraud is strict and punitive enforcement.
- ◆ The various comments addressing the provision of interim compensation confirm CPA's position that there is a pressing need for compensation to be implemented effective as of the earliest lawful date.

Many issues addressed in the parties' opening comments relate to the advancement of fair competition between incumbent LECs and independent payphone providers ("IPPs") in the provision of payphone services. In response, CPA is particularly concerned to make the following points:

- ♦ The opening comments of several parties highlight the fundamental choice the Commission must make in identifying and evaluating assets associated with the LECs' payphone operations; these comments confirm CPA's view that it is crucially important for the Commission to take a realistic view of what the assets of the LECs' payphone operations are and how much they are worth.
- ♦ CPA supports the recommendation of the Georgia Public Communications Association that incumbent LECs be required to offer and price on a nondiscriminatory, unbundled basis all functionalities of their own payphone services; the Commission should require the LECs to impute to their own payphone operations the same prices set for others to purchase those unbundled service elements.

## II.

### **THE COMMISSION SHOULD DETERMINE THE MECHANICS, LEVEL AND TIMING OF COMPENSATION WITH THE GOAL OF ENSURING FAIR COMPENSATION FOR EVERY COMPLETED CALL.**

#### **A. The Commission Should Set a Uniform Rate for Local Coin Calls While Allowing States to Seek Temporary Variances [¶¶ 20-22].**

The Florida Public Service Commission has proposed in its comments that the Commission set a nationwide maximum rate for local coin calls, but with an expressly stated mechanism for a state to petition for a variance from the nationwide cap. Comments of Florida Public Service Commission, at 3. The Florida Public Telecommunications Association has submitted a nearly identical proposal. Comments of Florida Public Telecommunications Association, at 4.

Several of the state commissions have been more jealous of their traditional control over local coin rates. For example, the California Public Utilities Commission ("California PUC") has offered a proposal that the Commission set guidelines prescribing a "per-call" pricing methodology for determining fair compensation generally, while recognizing the states' interest in setting rates for local calls. Comments of the People of the State of California and the Public Utilities

Commission of the State of California, at 13. However, for the reasons amply demonstrated in the comments of APCC, it is necessary for the Commission to take a more direct role in prescribing a uniform maximum national rate for local coin calls. See, Comments of the American Public Communications Council, at 13-19.

CPA believes that the Florida proposal bridges the chasm between the California PUC and the APCC on this issue. There is an understandable interest among many state commissions in constraining increases in local coin rates. Yet the Commission's obligation to ensure fair compensation creates a compelling need for greater uniformity in this most crucial of all payphone charges. The Florida proposal would set such a uniform rate but, as the Florida Commission observes, would enable each state to evaluate its situation in light of the nationwide rate cap and determine whether the cap is appropriate based on local issues.

CPA's only reservation about the Florida proposal is its open-ended nature. APCC has presented a compelling case for nationwide uniformity of local coin rates. That should be the ultimate goal. Any express provision for variances from that goal should be interim in nature, set to be extinguished or at least revisited after a specified term. Accordingly, CPA recommends that the Commission set a nationwide local coin rate cap consistent with the recommendations of APCC but subject to an expressly stated mechanism for a state to petition for a variance from the nationwide cap, with any such variance to be effective for no more than three years unless its extension is justified by a subsequent petition.

**B. Proposals to Set Compensation for Non-Coin Calls Based on Incremental or Marginal Costs Should Be Rejected as Inconsistent with the Need to Determine a Surrogate for the Market Value of Payphone Access [¶ 38].**

Numerous parties, virtually all of them interexchange carriers ("IXCs"), have proposed that the Commission set the level of compensation for non-coin calls based on their versions of total service long-run incremental cost ("TSLRIC") or, more often, simply marginal cost. See, e.g., AT&T Comments, at 3-4; Comments of Sprint Corporation, at 17-20; Comments of Worldcom, Inc., at 12; Comments of Frontier Corporation, at 6; Comments of Excel Telecommunications, Inc., at 2-3; Comments of Competitive Telecommunications Association, at 15.<sup>1/</sup>

The determination of fair per-call compensation for payphone providers is not an exercise in public utility ratemaking for a dominant carrier, where the Commission can comfortably set rates or rate floors for competitive services at TSLRIC in confidence that the utility will have an opportunity to be made whole through rates for other, less competitive services.<sup>2/</sup> Congress has called upon the Commission to set payphone compensation for a very different reason, and the Commission "is not bound to adhere to existing mechanisms or procedures established for general regulatory purposes in other provisions of the Communications Act." Conference

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<sup>1/</sup> Some of the leading IXCs add odd twists to their proposals. See, e.g., AT&T's ill-founded suggestion that fair compensation based on TSLRIC need not consider the cost to the payphone provider of the access line or of payments to location providers (AT&T Comments, at 4) and Sprint's absurd inference that payphone providers' current acceptance of 25¢ per dial-around call from AT&T means that they are fairly compensated for the cost of all non-coin calls and so "the proper unit charge would be 6.75¢ per call" (Sprint Comments, at 21-23).

<sup>2/</sup> Conversely, it is difficult to envision MCI or any other IXC accepting, without legal challenge, a Commission order requiring that its 1-800-COLLECT product be repriced at any measure of its cost, even should Dr. Hatfield produce a study showing that cost exceeded 8.3¢ per call. Cf. MCI Comments, at 13.



Report on S.652, Telecommunications Act of 1996. New Section 276 - Provision of Payphone Services.

The need for the Commission to set compensation levels for payphone-originated non-coin calls flows from the previously imposed Congressional mandate (and collateral mandates of many state commissions) that payphone providers allow access for various types of non-coin calling. Being prohibited from blocking the use of their stations for the placement of carrier access and subscriber 800 calls, the payphone provider has no leverage to require carriers or end-users to pay for such access. Thus, in setting "fair" compensation, it is the Commission's role to establish a surrogate for the price an effectively competitive market would set for the delivery of such calls if payphone providers were free to choose whether to deliver them or not.

The solution to this problem is to determine the market value of payphone access for the placement of non-coin calls, not to determine the marginal cost of placing one more such call. The Commission approached this problem in a proper way when, in its Second Report and Order implementing TOCSIA, it looked at a selection of cost-based and value-based surrogates to determine that a compensation rate of 40¢ per call was reasonable. See, NPRM, Paragraph 36. That remains a proper approach, and still, as APCC has shown, amply justifies a uniform compensation rate of 40¢ per call. APCC Comments, at 12.

**C. Incumbent LECs Should Be Responsible for Tracking, Billing and Collecting Compensation for Their Payphones and Those of IPPs [¶ 30].**

Several parties from various sectors of the industry have proposed in their comments that the incumbent LECs should fill the role of call tracking, recording, billing, and collection with respect to per-call compensation. IXC's both large and small

have taken this position, apparently to avoid the expense and complexity of developing their own capabilities to perform these tasks or of processing bills from thousands of individual payphone providers. See, e.g., MCI Comments, at 8-9; Excel Telecom Comments, at 7; Comments of the Competitive Telecommunications Association, at 9-11, Comments of WorldCom, Inc., at 13.<sup>3/</sup> Several carriers point out that the LECs' experience in billing for access services and their carrier access billing systems ("CABS") make the LECs best suited to perform these functions. See especially, WorldCom Comments, at 14-18; Comments of Cable & Wireless, Inc., at 11-13; Comments of California Association of Long Distance Telephone Companies, at 4-5.

The LECs appear to agree with this assessment, but some are rather coy about it. Thus, the RBOC Payphone Coalition agrees that the technology for effective call tracking exists and is employed today, but would hold the IXCs responsible for tracking calls, subject to audit and inspection procedures. The RBOCs would like to be free to offer their own tracking technologies to carriers, but without being required to do so. Comments of the RBOC Payphone Coalition, at 7-8. Ameritech, on the other hand, notes its ability "to do all the measuring and recording that is necessary to make the IXC pay telephone use fee tariff effective," and believes similar billing mechanisms could be instituted by other LECs to bill compensation for their own payphones as well as those of IPPs. Comments of Ameritech on Pay Telephone Issues, at 9-10. Accordingly, Ameritech sees no reason for deviating from the "pattern universally followed," whereby the party expecting payment takes responsibility for billing the party who is going to pay. Id. at 11

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<sup>3/</sup> Even Frontier Corporation, which would prefer to see the calling party obliged to pay compensation by coin, would have the LEC collect and disburse payments under any carrier-pays system. Comments of Frontier Corporation, at 10-17.

Ameritech would offer a service for billing charges for per-call compensation on behalf of IPPs in its service area, provided it is reasonably compensated for that service. Id. at 10-11. Both MCI and APCC urge that LECs providing such tracking and billing services should make them available to IPPs at the same rates, terms and conditions as they charge (or impute) to their own payphone operations. MCI Comments, at 8-9; APCC Comments, at 26.

CPA agrees that the LECs -- at least the larger ones -- are the most logical candidates for tracking, recording, billing and collecting per-call compensation both for their own payphones and those of IPPs. In the case of IPP stations, the LECs should be obliged to offer these services on the same terms and at the rates they apply (or impute) to their own payphone divisions and, in addition, they should unbundle these functions so that IPPs and their billing agents can employ the LECs' systems to whatever extent matches their resource needs.

If there are small carriers unable to deal with an LEC-managed tracking procedure or small LECs unable to provide such tracking, an alternative is to require some form of estimated or surrogate compensation. Such a surrogate might be based on the average compensation paid in neighboring regions where LECs do provide call tracking. Any such surrogate should be calculated to provide an incentive for the LEC to develop the necessary tracking capability.

**D. Concern About Potential Fraud Does Not Justify Narrowing the Definition of a Completed Call, but Rather Calls for Strict Enforcement [¶¶ 17, 23].**

The comments of several IXCs express concern about the potential for payphone providers to increase their compensation payments by fraudulently dialing 800 subscriber numbers by the use of auto-dialers or other means. See, e.g., AT&T

Comments, at 15; Comments of the Intellicall Companies, at 27-28. Intellicall proposes that calls of less than one-minute duration should be excluded from compensation, based on the claim that such an exclusion would greatly reduce the potential for fraud and for compensating uncompleted or "incidental" calls. Id. at 33-36.

Obviously, Intellicall's primary concern is to protect its debit card operations from bearing compensation obligations for "incidental" calls completed to the card provider's platform. Id. at 35-36.<sup>4/</sup> Even so, Intellicall's draping of its cause in fraud protection clothing requires a response.

The Telecommunications Act clearly requires the Commission to ensure fair compensation for every completed call. No compensation cannot be fair compensation. Certainly, considering the great volume of calls to pagers and debit card platforms that are placed from pay telephones, there is nothing de minimis about this issue, and there is certainly no "administrative need" for the Commission to deny compensation for calls of less than an arbitrarily determined duration.

Whoever tracks payphone-originated calls for purposes of calculating compensation obligations, whether it be a LEC, an IPP, an IXC, an operator services provider, or an independent billing agent, will have responsibility either for applying reliable answer supervision or for applying other rationally supportable criteria for distinguishing completed from uncompleted calls. The one-minute rule proposed by Intellicall is not rational; it is irrelevant to the distinction that needs to be made.

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<sup>4/</sup> Intellicall is also surprisingly solicitous of the interests of its counsel's paging carrier clients, to which most completed calls last less than one minute. See, Intellicall Comments, at 36 n. 34; compare, Comments of Paging Network, Inc. How a completed call to a pager, which delivers precisely the intended message, can be considered "incidental" is difficult to fathom.

Nor is the proposed one-minute rule an appropriate response to legitimate concerns about potential fraud. The right way to deal with fraud is to deter it. Deterrence can be achieved by strict, swift, and severe penalties for violations. For example, California's COPT Enforcement Program imposes California PUC ordered termination of service for IPP stations that remain out of compliance with applicable consumer protections after inspections. Considering the several hundred dollar cost of reconnecting service, that is an expensive penalty, and it has produced results in the form of substantially improved compliance. Such a penalty, and perhaps more severe criminal sanctions, would go far toward holding the incidence of fraud in connection with per-call compensation to de minimis levels.

**E. The Commission Should Implement Interim Compensation as of the Earliest Lawful Date [¶¶ 39-40, 51].**

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The APCC argues convincingly in its opening comments that interim per-call compensation is urgently needed by IPPs both in view of the extraordinary growth that has occurred and continues to occur in the use of 1-800 numbers for various purposes and in order to achieve parity with the payphone operations of the LECs, which continue to enjoy the benefits of recovery through access charges of their payphone investments. See, APCC Comments, at 34 et seq. APCC also notes the many years' notice carriers have had of the pendency of the Commission's consideration of subscriber 800 compensation, and the Telecommunications Act's express notice to carriers that such an obligation was imminent. Id. at 39-40. There is, therefore, no legal or equitable bar to ordering interim compensation from the date of the NPRM.

The Commission should harbor no illusions about the abilities of state commissions to implement compensation for intrastate calls while the Commission is developing permanent rules. An illustrative case is the California PUC's inability to overcome IXC resistance to implementation of a requirement that the IXCs bill and collect California's Pay Station Service Charge on intraLATA non-coin calls. Even now, almost two years after the California PUC concluded that such a requirement was fair, MCI and Sprint still have not begun billing and collecting the charge and show no inclination to do so.<sup>5/</sup> In short, only this Commission can make interim compensation a reality.

Generally speaking, the split of parties supporting and opposing interim compensation is not surprising. IPPs and their trade associations are supportive; IXCs are opposed. What shows considerable chutzpah, however, is the opposition of the RBOC Payphone Coalition.

The RBOC Coalition believes interim compensation would be "unwise, unadministrable, and illegal," and would grant a "windfall to one particular group of industry players and therefore would unbalance the playing field." RBOC Coalition Comments, at 19 (emphasis added). RBOCs, give the Commission a break!

We all know the RBOCs have been recovering their payphone investment costs since time immemorial (i.e., since the AT&T divestiture) through carrier access charges. Even Congress was aware of this fact which is why Section 276(b)(1)(B) was included in the Telecommunications Act. We also know that IPPs have no

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<sup>5/</sup> While the California PUC asserts that "Sprint and MCI are required to implement the PSSC within a reasonable period of time" (California PUC Comments, at 7 n. 6), the PUC has taken no action to require these carriers to reform their dilatory and exorbitant tariffs for billing and collecting the charge. See, CPA Comments, at 4-5, 6-7

comparable source of income, particularly with respect to 1-800 subscriber calls. As in many other respects that the Telecommunications Act was drafted to address, so here also the proverbial "playing field" is already seriously out of balance. A Commission order requiring interim compensation effective as of the earliest lawful date will lend an important measure of equilibrium to the relationship among payphone providers. CPA urges the Commission to include such a requirement in its order in this proceeding.<sup>6/</sup>

### III.

**IN THE INTEREST OF FAIR COMPETITION,  
THE COMMISSION SHOULD IDENTIFY AND VALUE THE ASSETS  
OF THE LECs' PAYPHONE OPERATIONS REALISTICALLY  
AND SHOULD REQUIRE LECs TO OFFER ON AN UNBUNDLED  
BASIS THE ELEMENTS OF THE PAYPHONE SERVICES THEY USE.**

**A. The Opening Comments Highlight the Fundamental Choice the Commission Must Make in Identifying and Valuing Assets of the LECs' Payphone Operations [¶ 49].**

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In its opening comments, CPA urged the Commission to take a rigorous approach to the valuation of the LECs' payphone operations, including a detailed study of the current market value of each LEC's currently effective payphone location contracts. CPA Comments, at 16-18. Similar concerns were expressed by the Georgia Public Communications Association, the South Carolina Public Communications Association, and Robert M. Brill.

The Georgia Association emphasizes the importance of location as a key element in the value of a payphone and the need to recognize the value of long-term location contracts in the valuation of the payphone. Comments of Georgia Public

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<sup>6/</sup> The RBOC Coalition argues that "logically," any adjustment to Carrier Common Line Charges to remove LEC payphone costs should be deferred until per-call compensation begins to be paid. RBOC Coalition Comments, at 31. Conversely, logic also requires that if something prevents the Commission from implementing interim compensation for IPPs, then the LECs' recovery of payphone costs through carrier access charges should be terminated immediately.

Communications Association, at 15-16. The South Carolina Association notes that at least one RBOC has been active in renegotiating its location agreements for significantly longer terms, and urges that "the substantial value of these contracts must be accurately taken into account [and] must be properly amortized as a capital cost." Comments of South Carolina Public Communications Association, at 7. Mr. Brill notes that the incumbent LECs enjoy advantageous site locations, and urges that they not be allowed financial and accounting benefits that make them more competitive than independent providers. Comments of Robert M. Brill, Esq., at 4.

In sharp contrast to these realistic and accurate appraisals of a serious, practical problem, the RBOC Payphone Coalition calls for the valuation of LEC payphone assets based solely on net book value and solely with respect to physical assets that are reflected on the LECs' books. RBOC Coalition Comments, 27-30. Besides a claim that it would be "difficult, time-consuming, and expensive" to determine fair market values for embedded payphone assets, the RBOCs offer no justification for this position other than reliance on past Commission orders in the case of other transfers or separations of assets. Id.

A key precedent, cited by both the Georgia Association and the RBOC Coalition, is the Commission's Customer Premises Equipment ("CPE") Detariffing Order in the Second Computer Inquiry proceeding. The parties present dueling quotations from that order at Georgia Association Comments, at 15-16, and RBOC Coalition Comments, at 28 n. 29. What is particularly interesting about these references is the RBOCs' acknowledgement that the CPE Detariffing Order required transfer of land and buildings -- i.e., interests in real estate -- at appraised rather than book value. Id. As CPA observed in its opening comments, at least one RBOC, Pacific Bell, has made a



studied effort to give its payphone location contracts an aura of real estate value, entitling them "Space Use Agreements." CPA Comments, at 17 n. 19. To the extent they are characterized as interests in real property, the CPE Detariffing Order would require that these agreements be accorded current market value in connection with any separation of LEC payphone assets.

The United States Telephone Association ("USTA") also has addressed the assets valuation issue in its comments, agreeing with the RBOCs that the LECs' payphone facilities should be transferred at net book value. Comments of United States Telephone Association, at 6-7. USTA observes that the impact of this transfer should be neutral: "[N]either the customers of regulated services nor the future customers of nonregulated services should receive a benefit from the transfer." Id. at 8.

Identification and valuation of the assets of the LECs' payphone operations based on net book value will surely have the impact USTA seeks -- neither the general body of ratepayers nor the LECs' payphone users will receive any benefit. The benefit will accrue solely to the LEC. As CPA and other state payphone associations have shown in their opening comments, net book valuation simply overlooks the most important elements of the value of the LECs' payphone operations. Allowing the LECs to leave the expenses of their payphone location contracts as burdens to their general ratepayers while allowing them to pursue their payphone operations with unrealistically low booked investments will not benefit any group of ratepayers, but the impact of the transfer will be far from neutral -- its impact will be to confer upon the LECs an unfair and continuing competitive advantage over their

independent competitors, who lack a general body of ratepayers from whom they may recover their costs.

**B. LECs Should Be Required to Offer on an Unbundled Basis to IPPs the Functional Elements of the Payphone Services the LECs Themselves Employ [¶¶ 45, 48].**

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In its comments, the Georgia Public Communications Association has provided a detailed analysis of the various functionalities employed by the LECs to provide their own payphone services to end users, and recommends that the LECs be required to provide those functionalities to their payphone service competitors on a nondiscriminatory basis. See, Georgia Association Comments, at 5 et seq. In particular, the Georgia Association calls for the unbundling and pricing of the elements of the central office coin services the LECs have long used to serve economically priced "dumb" payphones, with particular attention to unbundled answer supervision, coin supervision, and fraud protection features, as well as access to joint marketing arrangements and to call tracking, validation, billing and collection features. Id. at 7-14.

CPA strongly supports these recommendations by the Georgia Association. Independent payphone providers require many of these service elements to be able to compete effectively against the LECs and to offer an improved quality of payphone services to end users.

Also, the explicit pricing of these service elements will assist the Commission and state commissions in applying the requirements of Section 276(a) of the Telecommunications Act and comparable provisions of state laws, which forbid LECs to subsidize their competitive payphone operations or to discriminate in favor of their own payphone services. Whatever rates are established for offering these service

elements to IPPs should also be imputed to the LECs' own payphone operations, and should create a cost floor for the LECs' pricing of those services.

**IV.**

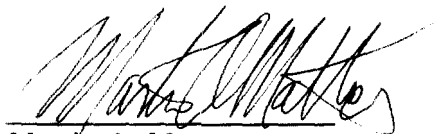
**CONCLUSION**

For the reasons stated above, California Payphone Association respectfully urges the Commission to take the actions recommended herein to advance the cause of competition in the provision of payphone services and to protect the interests of the nation's payphone users and other customers of telecommunications services.

Respectfully submitted,

GRAHAM & JAMES

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July 15, 1996